

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11

Date: 27 June 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR V. LAURENT GBAGBO***

Public document

**Decision on OPCV requests for access to confidential documents in the record
of the case**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

Counsel for the Defence
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom,¹ hereby issues the decision on two requests for access to confidential documents in the record of the case, submitted by the Office of Public Counsel for Victims (“OPCV”).

I. Procedural history

1. On 5 December 2011, during the first appearance of Laurent Gbagbo (“Mr Gbagbo”) before the Court, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.² On 12 June 2012, the Single Judge postponed the commencement of the hearing to 13 August 2012.³

2. On 16 May 2012, the Prosecutor submitted, pursuant to Rule 121(3) of the Rule of Procedure and Evidence (“Rules”), the detailed description of the charges brought against Mr Gbagbo (“Document Containing the Charges”), together with the list of evidence and other documents.⁴

3. On 25 May 2012, the Defence submitted the *“Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12(3), 19(2), 21(3), 55 et 59 Du Statut de Rome présentée par la défense du Président Gbagbo”* (“Challenge to Jurisdiction”).⁵

4. On 4 June 2012, the Single Judge issued the *“Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”* (“Decision on Victims’

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-T-1-ENG, p. 8.

³ ICC-02/11-01/11-152-Red, p. 12.

⁴ ICC-02/11-01/11-124 and annexes.

⁵ ICC-02/11-01/11-129.

Participation”),⁶ wherein she, *inter alia*, (i) admitted 139 victims to participate at the confirmation of charges hearing and in related proceedings; (ii) appointed counsel from the OPCV as common legal representative for the participating victims; and (iii) granted the participating victims certain procedural rights.⁷

5. On 7 June 2012, the OPCV filed the “Information as to the agreement between the Common Legal Representative and the Prosecution on access to documents and Requests in relation to the schedule of the confirmation of the charges hearing” (“First Request”),⁸ wherein it requests the Chamber to:

- Acknowledge the agreement regarding the access by the Common Legal Representative to the confidential material in possession of the Prosecution that it intends to use for the purpose of the confirmation of charges hearing;
- Order the Registry the notification to the OPCV of the document ICC-02/11-01/11-124, including its three annexes;
- Grant the Common Legal Representative’s Request in relation to opening and closing statements and written submissions on issues discussed during the confirmation of charges hearing referred to in paragraph 7 ; and
- Grant the Common Legal Representative’s Request to make submissions, either orally or in writing, on the definition of the mode of individual criminal liability under article 25(3)(a) of the Rome Statute.⁹

6. On 12 June 2012, the Defence filed its “*Réponse de la Défense du Président Gbagbo aux demandes du Représentant Légal des victimes relatives au calendrier de l’audience de confirmation de charges*” (“Response to the First Request”).¹⁰

7. On 15 June 2012, the Chamber issued the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute”, wherein it, *inter alia*, invited the OPCV, as legal representative of victims who have communicated with

⁶ ICC-02/11-01/11-138.

⁷ Decision on Victims Participation, pp. 25-26.

⁸ ICC-02/11-01/11-143.

⁹ First Request, pp. 7-8.

¹⁰ ICC-02/11-01/11-151.

the Court in relation to the case, to submit written observations on the Challenge to Jurisdiction.¹¹

8. On 18 June 2012, the OPCV filed the “Request to access documents in relation to the Defence Challenge to the Jurisdiction of the Court” (“Second Request”),¹² requesting the Chamber to:

- Order the notification to the OPCV of the Annexes 5, 9, 10 to 12, 25 to 44, 46 to 49 and 52 attached to the Defence Challenge;
- Order the notification to the OPCV of any other document filed confidential in the case record which the Chamber might identify as relevant to article 19 proceedings;
- Order to systematically notify the OPCV with any document submitted in relation to the Defence Challenge and which might be classified confidential – on the same basis as the parties in the article 19 proceedings.¹³

9. On 21 June 2012, the Defence filed the “*Observations de la Défense du Président Gbagbo au sujet de la requête du Représentant Légal Commun des Victimes demandant l'accès aux annexes confidentielles de la requête de la Défense contestant la compétence de la Court*” (“Response to the Second Request”).¹⁴

II. Applicable law

10. The Single Judge notes articles 61, 67 and 68 of the Rome Statute (“Statute”), rules 58, 59 and 121 of the Rules, and regulation 23 *bis* of the Regulations of the Court.

III. First Request

11. The Single Judge clarifies that this decision only addresses the issue of OPCV access to confidential documents in the record of the case. The other limb of the First Request, which relates to the conduct of the confirmation of charges hearing, will be addressed by the Single Judge in due course.

¹¹ ICC-02/11-01/11-153, p. 5.

¹² ICC-02/11-01/11-155.

¹³ Second Request, p. 9.

¹⁴ ICC-02/11-01/11-160 and annexes.

12. In support of its request for access to confidential documents in the record of the case, the OPCV, which refers to an agreement with the Prosecutor on this matter, submits that “the Prosecution has no objection in granting her access to the confidential version of the document containing the charges, as well as the three annexes thereto.”¹⁵

13. The Single Judge notes that following the filing of the OPCV First Request, the Prosecutor has not responded to it. The Defence does not raise any issue with respect to this particular matter in its Response to the First Request.

14. The Single Judge notes that the Document Containing the Charges was filed as confidential in the interest of the protection of witnesses.¹⁶ Two related documents (the List of Evidence and the Element-Based Chart) were also filed as confidential since they make reference to evidence disclosed confidentially between the parties.¹⁷

15. While noting that the Prosecutor appears to have agreed to the notification of the abovementioned document to the OPCV, the Single Judge is also of the view that the security of witnesses in this case would not be prejudiced if the Document Containing the Charges were notified to the OPCV provided that the OPCV respects at all time their current level of confidentiality. Similarly and for the same reasons, the Single Judge does not foresee any risk that would arise from enabling the OPCV to also have access to the List of Evidence and the Element-Based Chart. Consequently, the First Request may be granted.

¹⁵ First Request, para. 6.

¹⁶ ICC-02/01-01/11-124, p. 3.

¹⁷ *Ibid.*

IV. Second Request

16. The OPCV draws attention to the fact that it has not been notified of all of the annexes related to the Challenge to Jurisdiction and avers that “[t]he documents [it] has been notified with do not enable [it] to fully understand and to address the grounds on which the Defence Challenge is brought before the Chamber”.¹⁸ It contends that “without having access to such critical information, victims cannot be said to have been notified of the ‘summary of the grounds’ upon which the Defence Challenge is being made, as required under rule 59 of the Rules”.¹⁹ In support of its request for notification of the said annexes, the OPCV additionally relies on the jurisprudence of several Chambers of this Court, which have – in the submission of the OPCV – “systematically granted access to the OPCV [...] to documents pertaining to admissibility and jurisdiction challenges, including documents classified confidential, when relevant”. Finally, the OPCV submits that a reasonable balance must be struck between the rights of victims under article 19 of the Statute and rule 59 of the Rules and the protection of sensitive information regarding the health condition of Mr Gbagbo.²⁰

17. The Defence objects to the Second Request. It contends that pursuant to rule 59(3) of the Rules the victims only have the right to obtain a “summary of the grounds” of the Challenge to Jurisdiction, and not the content of all its annexes. In the view of the Defence, the Challenge to Jurisdiction already contains detailed argumentation in support of each point that it raises in its submissions, in effect providing the OPCV with more information than required pursuant to rule 59(3) of the Rules. Moreover, the Defence avers that

¹⁸ Second Request, para. 5.

¹⁹ *Ibid*, para. 6.

²⁰ *Ibid*, para. 11.

the Challenge to Jurisdiction itself details the pertinent parts of all confidential annexes.²¹

18. In addition, the Defence argues that the OPCV's interpretation of the jurisprudence of the Court is incorrect, as it cannot be said that access to confidential documents has systematically been given to the OPCV in similar situations.²²

19. Finally, the Defence submits that the annexes to the Challenge to Jurisdiction which are classified confidential contain: (i) correspondence of the Defence with the Ivorian government, ONUCI or the Prosecutor; (ii) documents related to judiciary proceedings in Côte d'Ivoire; (iii) statements of Defence witnesses; and (iv) documents related to Mr Gbagbo's health condition. The communication of these documents beyond the parties would be detrimental to the preparation of the Defence, the security of its staff and its witnesses, or the privacy of Mr Gbagbo.²³

20. In relation to the OPCV request for notification of other confidential documents related to the Challenge to Jurisdiction, the Defence submits that any such request must be made and determined on a case-by-case basis.²⁴

21. The Prosecutor has not responded to the Second Request.

22. The Single Judge does not consider that the information currently available to the OPCV in relation to the Challenge to Jurisdiction does not enable it to properly present observations as envisaged by article 19(3) of the Statute and rule 59(3) of the Rules. Indeed, as emphasised by the Defence, the Challenge to Jurisdiction is a public document that lays out the Defence's

²¹ Response to the Second Request, paras 20-29.

²² *Ibid*, paras 36-43.

²³ *Ibid*, paras 47-54.

²⁴ *Ibid*, para. 56-60.

arguments comprehensively and in considerable detail, also summarising and referencing the relevant content of its confidential annexes.

23. Notwithstanding the above, the Single Judge, cognizant of the principle of publicity of proceedings and in line with regulation 23 *bis* of the Regulations of the Court, which imposes on the Chamber the general duty to ensure that documents in the record of the case are filed under appropriate classification, considers that it is necessary to determine whether confidentiality *vis-à-vis* the OPCV is warranted as concerns the relevant annexes to the Challenge to Jurisdiction.

24. The Single Judge notes that the Defence provides the following justification for withholding access to the OPCV in respect of the documents requested:

- in regard to annexes 5, 38 to 43 and 46 to 49, they are related to judicial proceedings in Côte d'Ivoire, which are by their very nature confidential; and
- in regard to annexes 9 to 12, 25 to 37 and 44, they concern exchanges between the Defence and the Ivorian government, ONUCI or the Prosecutor and that their disclosure could put its authors or addressees at risk.²⁵

25. Having reviewed the relevant documents and the justification for the current level of classification as provided by the Defence, the Single Judge is of the view that the level of classification is warranted and that it is not appropriate that access be given to the OPCV.

²⁵ *Ibid*, para. 47. The Single Judge also notes that the Defence invokes protection of its witnesses as a reason to maintain the confidentiality of annexes 4 and 13 and the protection of Mr Gbagbo's privacy in relation to annexes 6 to 8 and 23 but notes that the OPCV does not request notification of these annexes.

26. The OPCV also requests notification of confidential annex 52. However, this annex is a list of annexes to the Challenge to Jurisdiction, and includes information the disclosure of which would compromise the level of classification of certain annexes listed. Therefore, access to annex 52 to the Challenge to Jurisdiction cannot be granted to the OPCV.

27. Finally, insofar as the request relates to future filings in the proceedings following the Challenge to Jurisdiction, the Single Judge clarifies that the responsibility to determine any necessary level of classification lies primarily with the parties. Accordingly, should the Prosecutor or the Defence ascertain that any particular document to be filed in the record of the case must be kept from the public but may nevertheless be notified to the OPCV, they will be expected to indicate so on the notification sheet of the document to be filed.²⁶ At the same time, the Single Judge also recalls that the Chamber has, pursuant to regulation 23 *bis* of the Regulations of the Court, the power to review *proprio motu* the level of confidentiality of any documents filed in the record of the case.

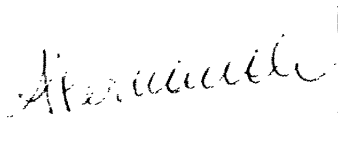
FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Registrar to notify documents ICC-02/11-01/11-124-Conf-Anx1, ICC-02/11-01/11-124-Conf-Anx2 and ICC-02/11-01/11-124-Conf-Anx3 to the OPCV;

²⁶ Decision on Victims' Participation, para. 56.

REJECTS the Second Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'S. Fernández de Gurmendi', followed by a vertical line.

Judge Silvia Fernández de Gurmendi
Single Judge

Dated this 27 June 2012

At The Hague, The Netherlands